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No. 01-618

IN THE
Supreme Court of the United States

ERIC ELDRED, ET AL.,
Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF JACK M. BALKIN, YOCHAI BENKLER, BURT NEUBORNE, ROBERT POST, AND JED RUBENFELD AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, the undersigned submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of this Court.

Amici are teachers and students of constitutional law and the First Amendment who are concerned with its application to copyright. They are Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School; Yochai Benkler, Professor of Law, New York University School of Law; Burt Neuborne, John Norton Pomeroy Professor of Law, New York University School of Law; Robert Post, Alexander F. and May T. Morrison Professor of Law, Boalt Hall School of Law at the University of California, Berkeley, and Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale Law School. *Amici* submit this brief *pro se*, representing no institution, group, or association.[1] Their sole purpose is to urge the Court to clarify that Congress's exercise of its power under Article I, Section 8, cl. 8 ("the Exclusive Rights Clause") is subject to the limits on congressional power imposed by the First Amendment.

Amici believe that copyright legislation, like all other congressional legislation, is subject to First Amendment review by the courts. While copyright legislation will ordinarily meet the requirements of the First Amendment because the policies underlying the Exclusive Rights Clause carry significant constitutional weight (especially when ameliorative doctrines such as the idea/expression dichotomy and the fair use doctrine ease

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[1] Printing and filing costs were paid by the Information Law Institute at New York University School of Law.

the tension between copyright and the First Amendment), that fact cannot justify the creation of a new categorical exception that immunizes copyright legislation from all First Amendment review. Where, as here, Congress, responding to the arguments of powerful copyright owners, acts to expand copyright protection dramatically at the expense of speech in the otherwise unregulated public domain, Congress's handiwork must be subject to traditional First Amendment scrutiny.

SUMMARY OF ARGUMENT

The Court of Appeals for the District of Columbia appears to have taken the extraordinary step of categorically immunizing copyright legislation from First Amendment review. "[C]opyrights," the appeals court held, "are categorically immune from challenges under the First Amendment." ***Eldred v. Reno***, 239 F.3d 372, 375 (D.C. Cir. 2001). "[W]e reject [plaintiffs'] first amendment objection to the CTEA ***because the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others***." *Id.* at 376. (emphasis added)

This is indefensible doctrine. Copyright law is not aimed at conduct that incidentally affects speech. It is explicitly designed to regulate the marketplace in expression. Its purpose is to suppress disfavored expression—deemed derivative or imitative—in order to enhance other expression—deemed original and creative. Although a judgment to protect originality at the expense of derivative expression may be justifiable, there is no doubt that such a judgment blocks the dissemination of much valuable speech. ***See, e.g., Estate of Martin Luther King Jr., Inc. v. CBS, Inc.***, 194 F.3d 1211 (1999) (preventing CBS from using in a documentary its own footage of the "I Have A Dream" speech, in deference to King's copyright in

the speech). Thus, although a speaker's use of copyrighted expression may constitutionally be regulated by appropriate copyright legislation, a speaker's desire to publish such expression clearly raises cognizable First Amendment issues.

The Court of Appeals advanced its unorthodox doctrine in order to insulate the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 301-304), from First Amendment review. The court held that the constitutionality of copyright legislation, including a dramatic and retroactive extension of its temporal scope, was immune from judicial scrutiny under the First Amendment. This holding is unprecedented. It effectively creates a category of unprotected speech that is wholly defined by Congress free of judicial review.

The category of unprotected speech created by the Court of Appeals differs from other categories of unprotected speech, like obscenity or fighting words. Legislation attempting to regulate obscenity or fighting words is always subject to judicial review to determine whether the relevant constitutional standards have been upheld. But the Court of Appeals would prohibit analogous review of copyright legislation, because it holds that speakers do not possess any First Amendment interests in publishing copyrighted expression. The Court of Appeals even refused to consider the First Amendment implications of the retroactive application of the CTEA—a provision unlikely to survive a minimal requirement that it be rationally related, much less narrowly tailored, to the constitutional mandate of copyright legislation to "suppl[y] the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

Copyright legislation cannot be said to be exempt from First Amendment review merely because it is enacted pursuant to the specific authorization of the Exclusive Rights Clause. All congressional legislation is enacted pursuant to constitutional authorizations of power, and yet all such legislation must meet First Amendment standards. It is not surprising, therefore, that the reasoning of the Court of Appeals flatly contradicts this Court's ruling in *Harper & Row*. In *Harper & Row*, the Court expressly referred to fair use and the idea/expression dichotomy as "First Amendment protections . . . embodied in the Copyright Act[.]" 471 U.S. at 560. These doctrines could not be "First Amendment protections" if individuals had no "cognizable first amendment right to exploit the copyrighted works of others."

The reasoning of the Court of Appeals is unsustainable even if it is narrowly interpreted to mean that the only limitations on copyright legislation imposed by the First Amendment are the idea/expression dichotomy and the fair use doctrine. To hold that the idea/expression dichotomy and the fair use doctrine are constitutionally mandated is to concede the necessity of First Amendment review to determine if a copyright statute has adequately met constitutional standards.

Because copyright law imposes selective prohibitions on communication, often at the expense of significant public discussion, it should be subject to heightened First Amendment scrutiny. This was the approach recently taken by the Court of Appeals for the Second Circuit in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), which upheld Section 1201(a)(2) of the Copyright Act only after carefully subjecting that provision to heightened First Amendment

scrutiny, *id.* at 454-55, applying the standard of review established by this Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) ("*Turner I*").

At this stage of the proceedings, however, the Court need not consider whether the CTEA satisfies heightened First Amendment scrutiny. The sole issue necessarily before the Court is the correctness of the refusal of the Court of Appeals to subject the CTEA to any First Amendment review. *Amici* respectfully suggest, therefore, that the Court vacate the decision below and remand to permit the Court of Appeals to review the CTEA under the heightened First Amendment scrutiny appropriate for laws specifically aimed at selectively regulating expression. The justifications advanced by Congress to support the CTEA are so very weak that they are unlikely to survive even moderately elevated scrutiny.

ARGUMENT

I. The Decision Below Creates a New and Unusually Expansive Categorical Immunity from Judicial Review for Copyright Legislation

The court below appears to have taken the unusual step of substantially immunizing an entire area of congressional legislation from First Amendment review. "[C]opyrights," the Court of Appeals held, "are categorically immune from challenges under the First Amendment." *Eldred*, 239 F.3d at 375. The court dismissed petitioners' First Amendment challenge to the CTEA on the grounds that "*the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others.*" *Id.* at 376. (emphasis added)

If the Court of Appeals meant what it said, then it has single-handedly created an entirely new category of unprotected speech. By holding that copyright statutes are immune from First Amendment review, it has effectively ceded to Congress the authority to enact whatever copyright legislation it chooses. The only possible justification for this remarkable holding is that copyrighted expression is, like obscenity or fighting words, categorically without First Amendment protection. But this conclusion is implausible, to say the least.

Copyrighted expression frequently lies at the core of protected speech. To pick a simple example, it would plainly be protected speech to publish a new edition of *Uncle Tom's Cabin*, a work that was once copyrighted but is now in the public domain. There is nothing intrinsic about the words of the novel that, like obscenity, deprives them of First Amendment protection. A speaker's First Amendment interest does not suddenly vanish merely because she chooses to express herself in words that happen to protected by copyright. Alice Randall, for example, who is the author of a book entitled *The Wind Done Gone*, had an obvious First Amendment interest in using elements of *Gone With the Wind* to retell the novel from the perspective of a slave, even though *Gone With the Wind* was still under copyright. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

Recognizing that Alice Randall has a First Amendment interest in publishing *The Wind Done Gone* does not imply that the First Amendment gives her license to ignore the requirements of a valid copyright statute. At issue in this case, however, is not whether, despite countervailing First Amendment interests, copyright law can constitutionally regulate expression, but rather whether

Congress is utterly unrestrained by the First Amendment when it enacts copyright legislation.

The implausibility of the Court of Appeals's conclusion can be seen by imagining a civil rights group seeking to publish an annotated version of *Uncle Tom's Cabin* in 1963 in celebration of the centennial of the Emancipation Proclamation. The publication of such a book would manifestly lie at the very core of speech properly protected by the First Amendment. Because the annotated book would constitute neither a fair use nor solely the appropriation of an "idea," its publication in 1963 would be permissible only because the original copyright of *Uncle Tom's Cabin* had expired in the late 19th century. Yet had the Reconstruction Congress shared the judgment of the 105th Congress and retroactively extended the term of copyright to life of the author plus 70 years, *Uncle Tom's Cabin* would still have been under copyright in 1963. The Court of Appeals would have us believe that in such hypothetical circumstances the civil rights group would have had ***no cognizable First Amendment interests*** in publishing the annotated edition.

The theory of the Court of Appeals implies that the boundaries of constitutionally protected speech expand or shrink as Congress decides the length and breadth of copyright protection. This implication is surely constitutionally backwards. First Amendment rights restrain congressional enactments, not the reverse.

The theory of the court below is so implausible that it is tempting to assume that the court could not possibly have meant what it said. But its words were explicit, and, more importantly, the Court of Appeals utterly refused to evaluate the CTEA in light of relevant First Amendment standards. The circuit court's express formulation places

expression that uses copyrighted materials in a shrinking group of categorically unprotected speech—like obscenity and fighting words. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The modern Supreme Court has, however, recognized that categorical exceptions to the First Amendment often substitute labels for analysis, and that they therefore risk diluting the judiciary's constitutional duty to subject restrictions of free expression to exacting scrutiny. Compare, *e.g.*, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Valentine v. Chrestensen*, 316 U.S. 52 (1942), with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial speech). Indeed, this Court has recently declined to create a new categorical exception to the First Amendment for electronic images depicting offensive sexual behavior by children. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (April 16, 2002).

Most importantly, this Court has refused to permit states to regulate even the shrinking group of categorical exclusions to First Amendment protection without subjecting such regulations to appropriate constitutional scrutiny. This is because the definition of categorically unprotected speech is for courts to decide on the basis of their understanding of relevant constitutional standards. Thus legislation regulating obscenity is subject to judicial review to determine whether legislative definitions accord with constitutional requirements. *See Miller v. California*, 413 U.S. 15, 23-24 (1973) ("We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); See *Ashcroft v. Free Speech Coalition, supra*. Similarly, the categorical exception for "fighting words" does not accord automatic

immunity to laws purporting to regulate them; courts must still determine if a statute only regulates that which may properly be regulated. See *R.A.V.*, 505 U.S. at 385-6.

The theory adopted by the Court of Appeals, however, proposes a category of unprotected speech that is not defined by this Court, but by Congress. The court below held both that there are no cognizable First Amendment rights to publish expression that has been copyrighted, and that the scope and provisions of copyright statutes are exempt from First Amendment review. This goes far beyond any First Amendment decision ever adopted by this Court. The Court of Appeals may well have been concerned to construct a theory that would prevent every copyright infringement suit from turning into a constitutional case. But the court constructed a doctrine that is plainly overreaching, for the doctrine prohibits not merely constitutional challenges to the application of otherwise valid copyright statutes, but also to the constitutionality of copyright statutes themselves.

The very point of the reasoning of the Court of Appeals was to preclude First Amendment challenges to the constitutionality of the CTEA. The court stated that "*[t]he works to which the CTEA applies,* and in which plaintiffs claim a first amendment interest, *are by definition under copyright*; that puts the works on the latter half of the 'idea/expression dichotomy' and makes them subject to fair use. *This obviates further inquiry under the First Amendment*." *Eldred,* 239 F.3d at 376. (Emphasis added.) The works are "by definition" under copyright, however, only because Congress chose to define them so. And the First Amendment inquiry "obviated" is the inquiry into whether or not that congressional definition was itself justifiable in terms of the First Amendment.

The Court of Appeals might have been tempted to accord to copyright legislation an extraordinary exemption from First Amendment review because such legislation is authorized by a special empowering clause of Article I. But this argument proves too much, because *every* congressional statute must be enacted pursuant to a constitutional grant of power. Nor can it be that congressional legislation requires less scrutiny under the Bill of Rights when it derives from a narrowly specified power, rather than a broad power. Congress cannot abrogate the fifth and sixth amendment rights of those accused of piracy on the high seas, simply because the Constitution specifically authorizes Congress to punish piracy in Article I, Section 8, cl. 10.

The Exclusive Rights Clause is one of the few empowering clauses that this Court has unanimously held for over 100 years expressly to include substantial constraints on how it can be used. See *Trade-Mark Cases*, 100 U.S. 82, 94 (1879); *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) (the clause "is both a grant of power and a limitation"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989); *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349-51(1991). The existence of these constraints, however, does not justify immunizing copyright legislation from First Amendment scrutiny. This Court has, for example, interpreted the Bankruptcy Clause, Article I, Section 8. cl. 4, expressly to constrain Congress by requiring it to enact bankruptcy laws that are nationally uniform. See *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). No one would argue that because the power to enact bankruptcy laws is explicitly circumscribed, such laws are immune from judicial scrutiny to determine whether, for example, they take property without compensation. Similarly, the fact that the Constitution particularly

circumscribes the power of Congress to grant what was at the time of its framing understood as a monopoly[2] is no reason to grant Congress special immunity when it regulates expression under this particular power.

II. The Categorical Exclusion Proposed by the Court of Appeals is Based on a Misconstruction of *Harper & Row*

The Court of Appeals based its unusual exception to First Amendment law on a misreading of this Court's precedent in *Harper & Row*. In particular, the Court of Appeals interpreted this Court as holding that copyrighted speech was without First Amendment protection when it stated that "[C]opyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556 (internal quotation marks omitted).

In *Harper & Row*, the Nation Magazine asked the Court to create a special First Amendment exception to copyright law for news reporting that used copyrighted materials. The Court refused, concluding, "we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." *Harper & Row*, 471 U.S. at 560.[3] There was no need, the

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[2] See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 54-56 (1994).

[3] Elsewhere the Court characterized the argument it rejected in these terms: "the fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication." *Harper & Row*, 471 U.S. at 557.

Court held, to create such a *special* First Amendment exception to the scope of copyright law "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use. . . ." *Id.*

The actual holding of *Harper & Row,* therefore, was exactly the inverse of the interpretation adopted by the Court of Appeals. This Court did not hold that users have no "cognizable First Amendment right to exploit the copyrighted works of others." Quite to the contrary, it characterized specific components of copyright law, like the fair use doctrine, as "First Amendment protections."[4] Fair use could not function as a "First Amendment protection" unless someone who could claim its benefit had a cognizable First Amendment interest in publishing otherwise copyrighted expression.

Far from implying that copyright legislation is immune from First Amendment review, therefore, *Harper & Row* actually holds that copyright legislation must be subject to constitutional review to determine if it maintains a proper balance between freedom of speech and the promotion of expression. At a minimum, it is clear that the doctrines expressly identified by this Court—fair use and the idea/expression dichotomy—cannot be repealed or

[4] *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (evaluating eligibility of a potentially infringing work to be treated as a parody and a fair use by quoting with approval the statement that "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.") (quoting *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (SDNY 1992) (Leval, J.)).

substantially weakened without passing First Amendment scrutiny.

Perhaps, however, the Court of Appeals merely meant to hold that the CTEA did not raise a First Amendment question because it modified neither the fair use doctrine nor the idea/expression dichotomy. On this interpretation, the Court of Appeals implicitly held that fair use and the idea/expression dichotomy *exhaust* the First Amendment protections embodied in copyright law, so that the First Amendment would have no relevance to any other provision in a copyright statute that altered the boundary between the public domain and copyrighted speech.

It is implausible to assume, however, that the First Amendment would touch copyright only at the points of fair use and the idea/expression dichotomy. Compare the First Amendment burden of the following two hypothetical statutes. First, imagine that the Third Congress had retroactively extended the term of copyright protection to a thousand years, thereby prohibiting unauthorized annotations of core documents from the Federalist Papers to *Uncle Tom's Cabin*. Second, imagine a contrasting statute that eliminates the fair use doctrine as to news reports, but that shortens the duration of copyright in such reports to 24 hours. There is no reason why the latter statute should be subject to First Amendment review, while the former should receive no First Amendment scrutiny at all.

Copyright legislation is subject to First Amendment review so as to ensure that public discourse is not unduly damaged by such legislation. Modifications of the idea/expression dichotomy and the fair use doctrine do not exhaust the damage that copyright legislation can inflict on public discourse. This Court's mention in *Harper & Row*

of fair use and the idea/expression dichotomy was thus not intended to be exhaustive, but merely to list the two copyright doctrines that were relevant to First Amendment issues in that case. As the Court of Appeals for the Eleventh Circuit in ***SunTrust Bank*** recently put it, "the balance between the First Amendment and copyright is preserved, ***in part,*** by the idea/expression dichotomy and the doctrine of fair use." 268 F3d at 1263 (emphasis added). Fair use and the idea/expression dichotomy merely ensure that "courts ***often*** need not entertain related First Amendment arguments in a copyright case." ***Id.*** at 1265 (emphasis added).

The recognition in ***SunTrust Bank*** that the idea/expression dichotomy and fair use doctrine are significant, but not exclusive, elements of the balance between copyright and the First Amendment, is plainly correct. The idea/expression dichotomy cannot provide comprehensive protection to public discourse, because the First Amendment safeguards specific modes of expression, not merely abstract ideas. As this Court stated in ***Cohen v. California,*** 403 U.S. 15 (1971) "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." ***Id***, at, 26. Requiring a critic of the Walt Disney Company to write a scholarly article or an editorial rather than publish a cartoon of Darth Vader sporting Mickey Mouse ears is no different than requiring Paul Cohen to write "I object to the draft." The idea/expression dichotomy cannot, then, play the definitive role that the court below attributed to it. It is an important mechanism to avoid conflict with the First Amendment, but only when the infringing expression is not an integral part of the speaker's message.

Although the fair use doctrine likewise provides important mitigation of the First Amendment burdens imposed by the Copyright Act, it too fails to provide comprehensive First Amendment protection. The doctrine does preserve some freedom of expression for users, but it ultimately remains bounded by the government's interest in providing owners with incentives. The First Amendment, however, may require that this interest be weighed against the relevant costs to freedom of expression in ways that the doctrine of fair use does not admit. A new annotated edition of ***Gone With the Wind***, for example, can play an important role in political discourse even though the edition may utilize too much of the original to enjoy the protection of fair use. If Congress extended the copyright period for ***Gone With the Wind*** to such an extended length of time that the copyright could no longer be said to contribute to the incentives for the novel's creation, surely a First Amendment question would be raised about the suppression of the publication of even such a "derivative" book.

It follows that statutory provisions establishing the temporal reach of copyright must be subject to judicial review to determine whether such provisions meet relevant First Amendment standards. Neither the idea/expression dichotomy nor the doctrine of fair use necessarily render copyright legislation compatible with the constitutional requirements of freedom of expression.

III. Legislation That Substantially Expands Copyright Should Be Subject to Heightened First Amendment Scrutiny

The Copyright Act is a statute that regulates speech. It tells some people that they cannot print or publicly present certain words or images. It is not a law aimed at

general conduct that has incidental effects on expression—like a trespass statute or an anti-littering ordinance. It is a law aimed *solely* at expression. It is not a time, place, and manner regulation intended to effectuate non-speech-related purposes.[5] Its entire purpose and effect is to regulate the production of information, culture, and knowledge. It selectively prohibits printing, publishing, and public expressive performance or display. To paraphrase this Court, if the regulation of printing, publishing, or public performance of materials one deems interesting or evocative is not regulation of pure speech, it is hard to imagine what would be. *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Such regulation requires elevated scrutiny.

Copyright legislation has traditionally been justified in relation to the First Amendment as providing "the engine of free expression." *Harper & Row*, 471 U.S. at 558. This Court has in the past considered legislation with analogous justifications. The cable "must-carry" rules, for example, were justified as facilitating the availability of information "from diverse and antagonistic sources." *Turner I*, 512 U.S. at 663-64; *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 192 (1997) ("*Turner II*"). But just as in *Turner* the Court found it necessary to review congressional legislation to ensure that it indeed advanced its goal of facilitating diverse discourse, so too must courts review copyright legislation to assure that it also actually functions

[5] "[I]n the context of intellectual property, [the] 'no adequate alternative avenues' test does not sufficiently accommodate the public's interest in free expression. Intellectual property, unlike real estate, includes the words, images, and sounds that we use to communicate. . . . Restrictions on the words or images that may be used by a speaker, therefore, are quite different than restrictions on the time, place, or manner of speech." *Cardtoons, L.C. v. Major League Baseball Players Ass'n.*, 95 F.3d 959, 971 (10th Cir. 1996) (citations omitted).

as an engine of free expression rather than as a vehicle of censorship.

We agree, of course, that ordinary copyright litigation should not be transformed into a First Amendment battlefield. The central lesson of *Harper & Row* is that the First Amendment should not normally be understood as constraining the application of generally valid rules in run-of-the-mill copyright cases. There is an important distinction, however, between using the First Amendment to review the constitutionality of copyright legislation, and using the First Amendment to second-guess the application of otherwise valid copyright laws. When *Congress* enacts legislation that imposes burdens on speech, even for the purpose of promoting benign ends, courts must review the legislation to ascertain its constitutionality. But when *courts* enforce the terms of otherwise valid copyright statutes, they can be presumed to incorporate relevant First Amendment considerations into their application of the legislation. See *SunTrust Bank*, 268 F.3d at 1265. ("As we turn to the analysis required in this case, we must remain cognizant of the First Amendment protections interwoven into copyright law.") For this reason, no special additional First Amendment review is necessary in ordinary cases involving the application of otherwise valid copyright law.

Fundamental modification of copyright legislation, by contrast, does require judicial scrutiny. Elevated First Amendment review is especially necessary when Congress acts to modify those components of copyright law that serve to avoid conflict with the First Amendment—components like the idea/expression dichotomy, the fair use doctrine, or the eventual availability of works in the public domain. Fundamental modifications of these components are not frequent. As Senator Hatch recognized in

introducing the predecessor bill that eventually evolved into the CTEA, "it is a rare occasion when we address the fundamental aspects of copyright protection." 141 Cong. Rec. S3390 (March 2, 1995). But the Senator well recognized that the extension he proposed would introduce precisely such a fundamental change. *Id.*

When Congress acts to alter the basic balance between copyright legislation and the First Amendment, this Court should at a minimum apply the same level of review that it applies to other laws that directly regulate speech in the name of improving the flow of information in society. The "must-carry" rules for the cable industry are an apt analogy. See *Turner I.* Applying *Turner*, congressional efforts to modify the major components of copyright law must at the very least actually serve the government's interest in supplying "the economic incentive to create and disseminate ideas," *Harper & Row*, 471 U.S. at 558, and they must do so in a manner that is no more restrictive than necessary. *Turner I*, 512 U.S. at 662.

It should be stressed that heightened judicial scrutiny is even more important in the context of copyright legislation than it was in the context of *Turner* and the other media regulation cases in which the *Turner* test has been applied.[6] Judicial review is especially significant when the political process is systematically deformed, so that it is unlikely to weigh all the interests affected by legislation. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), John Hart Ely, *Democracy and Distrust* (1980). Copyright legislation exemplifies the potential for such structural distortion.

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[6] *See, e.g., Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

In the context of ordinary media legislation, both the parties burdened and the parties benefited are usually well represented in the political process. For example, both the cable carriers who suffered the burden of the must-carry rules at issue in the *Turner* litigation, and the broadcasters who benefited from those rules, fully participated in the political process that produced the relevant regulations. Copyright legislation, by contrast, is not typically enacted with the benefit of such full and representative political participation. The ***benefits*** of copyright legislation accrue to the current owners of copyrights, who accordingly have every incentive to advance their present and palpable interests. But the ***burdens*** of copyright legislation are usually imposed upon diffuse members of the public, and most especially upon those who are not yet born or who are too young to articulate their interest in a copyright law that would more effectively protect their freedom of expression by shortening the duration of the copyright period. Opposition to copyright legislation is thus not fully representative.

The CTEA is a quintessential example of the kind of rent-seeking statute one would expect to result from this structural distortion. Retroactive extension of copyright in particular provides an immediate windfall for the owners of aging copyright inventories. Unsurprisingly, therefore, the Chief Executive Officer of Disney was described as being quite explicit about the importance of the CTEA to his company when he visited the Majority Leader of the Senate a week before the latter co-sponsored the bill. *See* Alan K. Ota, ***Disney in Washington: The Mouse That Roars***, Congressional Quarterly (August 8, 1998), 2167. Copyright owners were heavily represented in committee hearings in both houses, counterbalanced only by a rare academic voice. See 144 Cong. Rec. S11672-73 (Oct. 7, 1998); H. R. Rep. No. 105-452 at 5 (1998). The bill itself

was enacted in a single day—discharged by the Committee on the Judiciary, passed by the Senate by Unanimous Consent, considered by the House under suspension of the rules and agreed to by voice vote, all on October 7, 1998.

Although the benefits of copyright extensions to discrete industries are palpable and concrete, the costs of such extensions to future users are diffuse and intangible. Alice Randall, author of ***Wind Done Gone***, was but a child when the term of protection for ***Gone With the Wind*** was first extended, long before she could imagine that the extension would allow a district court to ban her book fifty-two years after Margaret Mitchell's death. See ***SunTrust Bank v. Houghton Mifflin Co.***, 136 F. Supp. 2d 1357 (N.D.Ga. 2001), ***reversed***, 268 F.3d 1257 (11th Cir. 2001). Her case is far from unique. Most potential users of copyrighted works rarely appreciate that their speech will be curtailed in a generation or more by a presently enacted statutory expansion of the Copyright Act. Predictably, therefore, opposition to the CTEA was confined to a smattering of academics and librarians, whose job it is to consider remote and diffuse consequences of legislation.

Copyright legislation typically produces such systematic structural distortions of the political process, and these distortions will always skew copyright legislation towards ever-increasing protection, with only occasional exemptions where specific harms are directly borne by cohesive interest groups such as broadcasters, cable operators, or software producers. Because copyright legislation restricts the fundamental right to communicate, elevated judicial scrutiny is required to ensure a proper balance between the state's interest in promoting copyrighted expression and the public's interest in freedom of expression.

In the procedural context of this case, the Court need not decide the precise level of applicable scrutiny to apply to the CTEA. In *Turner II*, this Court seemed to embrace the proposition that intermediate scrutiny was required in the context of a congressional statute seeking to further expression by differentially burdening the speech rights of distinct parties. *Harper & Row* describes copyright law in exactly these terms. While copyright law serves as "the engine of free expression" "[b]y establishing a marketable right to the use of one's expression," *Harper & Row*, 471 U.S. at 558, it also burdens speech in ways that must be mitigated by "First Amendment protections already embodied in the Copyright Act." *Id.* at 560.

Although *Turner II* suggests that a form of intermediate scrutiny should be applied to the CTEA, this Court need not now decide the precise level of scrutiny applicable to the different settings that might arise in the context of copyright legislation. The level of review appropriate to this case might best be left in the first instance to the Court of Appeals. All that is necessary at this stage in the litigation is to hold that copyright legislation should not be categorically immune from First Amendment review, and should be subject to some degree of elevated scrutiny.

IV. The Categorical Exclusion is Necessary to the Holding Below, as the CTEA is Unlikely to Survive Any Degree of Close Scrutiny

Were this Court to remand to the Court of Appeals with instructions to apply some form of elevated scrutiny to the CTEA, the statute would in our judgment be highly unlikely to survive. The statute was upheld by the Court of Appeals only because it utterly refused to apply any First Amendment review at all.

The CTEA extends the term of copyright from life of the author plus fifty years, to life of the author plus seventy years, or, where the copyright is initially vested in a corporation, from seventy five to ninety five years. *See* Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). It does so not only prospectively, but retrospectively as well. *See Id.* § 102 (b) & (d).

Had the Court of Appeals subjected the CTEA, in particular its retrospective application, to elevated First Amendment review, it is highly unlikely that important aspects of the statute would have been upheld. The justification for the Act is substantially weaker than that of other statutes which have been held unconstitutional, or which, though upheld, were understood to have presented hard cases.[7] The CTEA was enacted pursuant to Article I, Section 8, cl. 8 of the Constitution. Its constitutionally mandated goal is therefore to "suppl[y] the economic

[7] This Court, for example, subjected the must-carry rules to substantially more searching scrutiny than the court below applied to the CTEA, even though the *prima facie* (and, as it turns out, ultimate) economic justification for the must carry rules was substantially more sound than the economic rationale of the retroactive extension of copyright. See *Turner* II, 520 U.S. at 197-224. Another example is provided by a different panel of the Court of Appeals for the D.C. Circuit, which recently struck down the vertical and horizontal ownership rules imposed by the Federal Communications Commission on cable operators. Those rules—though held insufficiently justified—were based on a substantially more plausible economic rationale than any justification that could be offered in support of the CTEA. *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir.) *cert. denied sub nom. Consumer Fed'n of Am. v. FCC*, 122 S.Ct. 644 (2001) (FCC argued, for example, that a minimum of four national cable operators was necessary to give unaffiliated programmers sufficient access to cable outlets for their programming without market distortion, whereas the Court of Appeals held that the Commission had not established that a national duopoly would not have sufficed).

incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558. The Senate Report on the predecessor bill indeed suggested that authors "are able to bargain for the present value of the projected income from commercial exploitation of the work over the course of the entire copyright term. The additional value of a longer term will, therefore, be reflected in the money received by the author for the transfer of his or her copyright, leading again to increased incentives to create." S. Rep. No 104-315 at 12 (1996).

It is not at all clear, however, that the CTEA's *prospective* extension of the copyright terms, much less its retroactive extension, can be justified in terms of the creation of economic incentives. The discounted present value of any revenue stream to be captured eight decades or more in the future is virtually non-existent. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 323-29 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. L. STUD. 325, 361-62 (1988). We can calculate, for example, how much an author might presently expect to receive in return for one million dollars of royalties 85 years hence, or what the current value of these million dollars would be to investors invited to finance a movie. Using a conservative (relative to media investment risk) business discount rate of 10-12%, the present value of these expected one million dollars is only between $303 and $66, barely enough to cover the cost of a modest lunch for prospective investors. Imagine the responses a movie producer would get from the investors gathered at this lunch were he to promise them that they will indeed reap these riches eighty or ninety years hence.

If the CTEA's *prospective* extension of copyright terms is hard to justify in terms of the creation of economic incentives, the CTEA's *retrospective* application of this

extension creates no economic incentives at all. A retroactive extension of copyright term applies by definition to works that have already been created and copyrighted. Absolutely no incentive is necessary to ensure the creation of *these* works, because they have already been created. Incentives existing prior to the CTEA were evidently sufficient to bring them into being. *See* Landes & Posner, *supra*, at 362; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1194-95 (1970). And yet, as the history of the CTEA makes clear, it is precisely retroactive application that introduces the greatest distortion of the political process, for it is the risk-free immediate windfall on aging inventories that was the greatest payoff for lobbying in support of the CTEA's term extension.

Perhaps cognizant of the woeful inadequacy of the incentives-based justification for the CTEA, legislative history suggests three additional justifications for the CTEA, discussed extensively in the Senate Report from 1995 and restated perfunctorily in the House Report from 1998. The three reasons are: First, harmonization with Europe; second, increasing life span and a supposed resultant need to adjust the term to assure a royalty stream during the lifetime of both the author and at least one additional generation; and third, the preservation of existing works.

This Court need not actually review these justifications at this time, but need only remand to the lower court to consider them. It is the role of the courts below to scrutinize these alternative justifications and to judge their sufficiency. It is clear, however, that the government will find it difficult, if not impossible, to

justify the CTEA in its entirety in the face of appropriately heightened scrutiny.

"Harmonization" with nations that protect speech less than does the United States is not a legitimate government interest. The Government could not impose prior restraints on hate speech, citing as its important interest the fact that it had signed a treaty obligation to do so. A mere policy preference for harmonizing with the longer protection periods available in Europe is accordingly an inadequate justification for extending copyright terms in ways that unduly damage public discourse. That Europe's nations have chosen a different balance between freedom of speech and social policy is not a legitimate reason for restricting American freedom of speech. Moreover, there is no evidence in the legislative record to support the rather surprising claim that American competitiveness depends on revenue streams from 75-year-old materials, or that the Government could not have persuaded the European Union to treat American companies no worse than it treats its own companies. Plainly, the industry lobbies responsible for term extension are much more interested in using the harmonization argument to tax American consumers for an additional twenty years than they are, for example, in receiving national treatment in Europe. Here again the CTEA bespeaks more of a Congress beholden to industry lobbying than of reasoned balance between the promotion of copyrighted expression and freedom of speech.

The argument about the need to adjust the law to account for longer life spans fares no better. It is simply a romanticized version of the incentive argument. Neither teen pop stars nor octogenarian composers are likely to be affected by the prospect of great grandchildren living on the revenue flow from their royalties eighty or a hundred and twenty years hence, any more than would the investors

gathered at the movie producer's lunch be likely to be impressed by revenue streams many decades removed. Indeed, lengthening life span already increases the average length of protection because the term of a copyright is pegged to the life of the author, thereby allowing owners to save more over the term of a copyright so as to support their offspring after the copyright expires.

The argument about *preserving* existing works, rather than providing incentives for the creation of new works, is no more convincing than the first two justifications proffered. There is no evidence that the preservation of existing works presents an actual problem. The ease with which we can access old books from Plato to Kant, Shakespeare to Dickens, suggests that there is little that needs to be done for books. Neither is there a dearth of recordings of Mozart's music. Perhaps there is some special problem for film or rare musical recordings. If so, Congress can address the problem by a variety of less restrictive means aimed to help actual restorers. These could range from tax benefits or targeted subsidies, to misappropriation-type rules that prevent slavish copying of restored works by competitors. Any of these options would be substantially less restrictive than an across-the-board retroactive extension of all copyrights, which would not only afford statutory protection to preserved versions of old works, but would also prohibit all new works that are in any way "derivative" from these old works. *Turner II*, 520 U.S. at 253-56 (O'Connor, J. dissenting) (describing competition regulation and subsidy as less restrictive alternatives to the "must carry" legislation in question there).

Perhaps there are other, good reasons to support the CTEA's retroactive extension. It is unnecessary, however, for this Court to prejudge the weight and sufficiency of

hypothetical reasons, because the court below never properly considered them. It is not this Court's practice "to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 760 (1996).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court reverse the judgment below and remand for reconsideration in light of an appropriate First Amendment standard of review.

Respectfully submitted,

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